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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SYNSAYSHA SHAUNTEEK THOMAS, Defendant and Appellant.	A144719 (Solano County Super. Ct. No. FCR305162)

Defendant Synsaysha Shaunteek Thomas appeals the denial of her Proposition 47 petition to reduce her convictions of second degree burglary to the new crime of misdemeanor "shoplifting." Her appeal raises two issues: (1) whether defendant's entry into a commercial establishment with the intent to commit theft by false pretenses qualifies as shoplifting; and (2) whether the district attorney is entitled to rescind the negotiated disposition and reinstate the dismissed charges if defendant's petition is granted. Both issues are on review before the California Supreme Court. (*Harris v. Superior Court* (2015) 242 Cal.App.4th 244, review granted Feb. 24, 2016, S231489 [rescinding plea agreement]; *People v. Gonzales* (2015) 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171 [theft by false pretenses].)

We conclude defendant's entry into a commercial establishment with the intent to commit theft by false pretenses qualifies as shoplifting. Accordingly, we reverse and remand to the trial court with instructions to resentence defendant unless the court determines resentencing would "pose an unreasonable risk of danger to public safety."

(Pen. Code, § 1170.18, subd. (b).)[1] We also conclude that if the trial court grants defendant's petition, the district attorney may not rescind the plea agreement and reinstate the dismissed charges.

BACKGROUND[2]

In January 2014, defendant committed a series of thefts in which she stole credit cards from customers at supermarkets and department stores, then purchased items with the stolen cards at the same establishments or others nearby. The district attorney charged defendant with 10 counts of second degree commercial burglary (§ 459) and three counts of petty theft (§ 484, subd. (a)).

In accordance with a negotiated disposition, defendant pleaded no contest to two of the burglary counts. The first count (count 10) related to a $300 purchase defendant made with a stolen credit card at a Nugget Market. The second count (count 13) related to $637.89 in purchases made with stolen credit cards at a Target store. The trial court placed defendant on three years' probation, conditioned on serving 150 days in county jail. The remaining charges were dismissed, as were charges against her in a separate criminal case.

In January 2015, defendant filed a Proposition 47 petition to reduce her two second degree burglary convictions to misdemeanor shoplifting. The trial court denied her petition, stating: "[Defendant] was not shoplifting because she wasn't stealing anything that belonged to the store. The object of her crimes was not the store or the merchandise in the store, it was what other shoppers had with them, their purses or identities."

DISCUSSION

Shoplifting and Theft by False Pretenses

"Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] As the parties did, we draw the relevant facts from the probation report.

sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be 'resentenced to a misdemeanor . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety.' (§ 1170.18, subd. (b).)" (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1092 (*Rivera*).)

Proposition 47 enacted section 459.5, which redefines certain second degree burglaries as misdemeanor shoplifting. It states, in pertinent part: "Notwithstanding Section 459, shoplifting is defined as entering a commercial establishment with intent to commit larceny while that establishment is open during regular business hours, where the value of the property that is taken or intended to be taken does not exceed nine hundred fifty dollars ($950). Any other entry into a commercial establishment with intent to commit larceny is burglary." (§ 459.5, subd. (a).) Shoplifting, with certain exceptions not relevant here, is punishable only as a misdemeanor. (*Ibid.*) Moreover, an act of shoplifting as defined in the statute "shall be charged as shoplifting" and "[n]o person who is charged with shoplifting may also be charged with burglary or theft of the same property." (§ 459.5, subd. (b).)

Defendant contends "larceny" refers to any type of theft, including theft by false pretenses. The Attorney General does not dispute defendant's conduct constituted theft by false pretenses. Nor does she dispute defendant's conduct otherwise meets the requirements of the shoplifting statute. Rather, the Attorney General maintains "larceny" should be limited to its traditional meaning—theft without the consent of the property owner—and should not apply to theft by false pretenses. (See *People v. Williams* (2013) 57 Cal.4th 776, 788 [explaining "larceny requires a 'trespassory taking,' which is a taking without the property owner's consent. [Citation.] . . . By contrast, theft by false pretenses involves the *consensual* transfer of possession as well as *title* of property; therefore, it cannot be committed by trespass."].)

A number of courts of appeal have recently addressed the meaning of larceny as used in section 459.5, and as we observed at the outset, the issue is on review by the

Supreme Court. (*People v. Gonzales, supra,* 242 Cal.App.4th 35, review granted Feb. 17, 2016, S231171.) Four courts have concluded larceny under section 459.5 includes theft by false pretenses. (See *People v. Vargas* (2016) 243 Cal.App.4th 1416, 1420, review granted Mar. 30, 2016, S232673; *People v. Triplett* (2016) 244 Cal.App.4th 824, 834, review granted Apr. 27, 2015, S233172; *People v. Root* (2016) 245 Cal.App.4th 353, 360, review granted May 11, 2016, S233546; *People v. Valencia* (2016) 245 Cal.App.4th 730, 735, review granted May 25, 2016, S233402.) We agree with these courts and reach the same conclusion.

The Penal Code does not define larceny in its traditional sense. Rather, larceny is statutorily equated with "theft." (§ 490a ["Wherever any law or statute of this state refers to or mentions larceny, embezzlement, or stealing, said law or statute shall hereafter be read and interpreted as if the word 'theft' were substituted therefor."].) Theft, in turn, is statutorily defined to include theft by false pretenses, that is, "knowingly and designedly, by any false or fraudulent representation or pretense, defraud[ing] any other person of money, labor or real or personal property." (§ 484, subd. (a).) It therefore follows that the "intent to commit larceny" requirement of section 459.5 is satisfied by an intent to commit any "theft," including theft by false pretenses. (See *Rivera, supra*, 233 Cal.App.4th at pp. 1099–1100 [In construing Proposition 47, "[w]e look first to the words the voters used, giving them their usual and ordinary meaning. ' "If there is no ambiguity in the language of the statute, 'then . . . the plain meaning of the language governs.' " [Citation.] "But when the statutory language is ambiguous, 'the court may examine the context in which the language appears, adopting the construction that best harmonizes the statute internally and with related statutes.' " ' "].)

The Attorney General acknowledges that, given section 490a, "there is a strong argument" that entry into a commercial establishment with the intent to commit any kind of theft constitutes shoplifting. She nevertheless urges shoplifting is "commonly" understood to be the taking of retail goods on display in a store and this is "more likely" what the voters intended. We have not been presented with any ballot materials that suggest this view is any more likely than an intent to integrate Proposition 47 into the

existing statutory framework defining theft. We therefore follow the rules of construction and read new section 459.5 in harmony with other Penal Code provisions.

Accordingly, we conclude defendant's convictions qualify her for resentencing and remand to the trial court to determine whether resentencing would "pose an unreasonable risk of danger to public safety." (§ 1170.18, subd. (b).)

Withdrawal of the Plea Agreement

The Attorney General contends that if the trial court grants defendant's petition on remand, the district attorney should have the option to rescind the negotiated disposition and reinstate the dismissed charges. This issue is also on review by the Supreme Court. (See *Harris v. Superior Court, supra,* 242 Cal.App.4th 244, review granted Feb. 24, 2016, S231489.)

We appreciate the Attorney General's view that if, as we held in *T.W. v. Superior Court* (2015) 236 Cal.App.4th 646, 652, Proposition 47 is applicable to defendants who have been convicted pursuant to negotiated dispositions, then local prosecutors are deprived of the benefit of the plea bargains and defendants charged with crimes far more serious than shoplifting end up with only misdemeanor convictions and not the penalty supported by their criminal conduct.

However, given our conclusion that Proposition 47 applies to plea bargain convictions—a result we continue to believe is required by the enactment's plain language—we cannot endorse a result here that would effectively eviscerate that conclusion. If district attorneys could rescind the underlying plea agreements, then Proposition 47 would effectively not be available to defendants convicted pursuant to negotiated dispositions.

Our conclusion that district attorneys may not withdraw plea agreements to avoid the consequences of resentencing under Proposition 47 is in accord with the decisions of three other courts all of which, as we have indicated are on review. (See *People v. Perry* (2016) 244 Cal.App.4th 1251, review granted Apr. 27, 2016, S233287; *People v. Gonzalez* (2016) 244 Cal.App.4th 1058, review granted Apr. 27, 2016, S233219; *People v. Brown* (2016) 244 Cal.App.4th 1170, review granted Apr. 27, 2016, S233274.)

The Attorney General's reliance on *People v. Collins* (1978) 21 Cal.3d 208 (*Collins*) is misplaced. In *Collins*, the Supreme Court held that when a plea agreement could not be effectuated because of a subsequent change in law (making sentencing pursuant to the agreement impossible), the prosecution was entitled to vacate the agreement and restore the dismissed counts. (*Id.* at pp. 214–215.) This was because the change in law "destroy[ed] a fundamental assumption underlying the plea bargain—that defendant would be vulnerable to a term of imprisonment"—thus depriving the prosecution "of the benefit of its bargain." (*Id.* at pp. 215–216.)

Collins is distinguishable as it involved full repeal of a criminal statute, resulting in "total relief from [the defendant's] vulnerability to sentence" that "substantially deprived [the prosecution] of the benefits for which it agreed to enter the bargain." (*Collins, supra,* 21 Cal.3d at p. 215.) Unlike in *Collins*, defendant will not "escape from vulnerability to sentence" because she remains convicted; rather, her punishment is only reduced.

Moreover, after *Collins*, the Supreme Court decided *Doe v. Harris* (2013) 57 Cal.4th 64, which clarified the effect changes in the law have on plea agreements. In *Doe*, the defendant argued a subsequent change in the law relating to sex offender registration deprived him of the benefit of his plea agreement. (*Id.* at p. 67.) The *Doe* court rejected his argument, explaining "the general rule in California is that plea agreements are deemed to incorporate the reserve power of the state to amend the law or enact additional laws for the public good and in pursuance of public policy. As an adjunct to that rule, and consistent with established law holding that silence regarding a statutory consequence of a conviction does not generally translate into an implied promise the consequence will not attach, prosecutorial and judicial silence on the possibility the Legislature might amend a statutory consequence of a conviction should not ordinarily be interpreted to be an implied promise that the defendant will not be subject to the amended law." (*Id.* at p. 71, fn. omitted.) The Attorney General has not explained why the general rule described in *Doe* should not apply to this case.

The Attorney General's reliance on *People v. Enlow* (1998) 64 Cal.App.4th 850, is also misplaced. There, the defendant pleaded guilty to auto theft and was sentenced to an agreed-upon term of eight years. (*Id.* at pp. 852–853.) Before the case became final, the Legislature reduced the punishment for recidivist auto theft, and the defendant argued his sentence should be reduced to correspond with the change in the law. (*Id.* at p. 853.) The appellate court rejected his argument, stating that "[s]ince the prison term was specifically negotiated by the parties, a reduction in the term would deprive the prosecution of one of the benefits for which it had bargained, i.e., an eight-year prison term. . . . Therefore, it would be improper for us to reduce the sentence. [The defendant's] remedy would be to seek withdrawal of his guilty plea." (*Id.* at p. 854.) *Enlow* is unlike this case because the new sentencing provision at issue in *Enlow* was not intended to apply to defendants who committed auto theft while the old sentencing provision was in place. (*Id.* at p. 858 ["the legislative intent was that persons such as [defendant] who committed his crime during the . . . period of increased penalties are to be punished pursuant to the increased penalties"].) Proposition 47, by contrast, is expressly designed to allow defendants to be resentenced for crimes committed prior to its enactment. (See § 1170.18, subd. (a).)[3]

[3] The remaining cases cited by the Attorney General have nothing to do with the withdrawal of a plea agreement following a change to the law. (See *In re Travis J.* (2013) 222 Cal.App.4th 187, 199 [even if appellate court agreed with defendant's assertion commitment to the Division of Juvenile Justice was unlawful because the juvenile court did not consider less restrictive alternatives, "the remedy would not be to simply set aside the disposition, but rather to allow the People to withdraw the plea agreement, restoring the seven dismissed felony charges, the two probation violation petitions, and the motions to find [the defendant] unsuitable for juvenile treatment"]; *In re Ricardo C.* (2013) 220 Cal.App.4th 688, 694, 699 [placement in facility different than one called for by plea agreement constituted unlawful alteration of agreement; appellate court observed juvenile court should have rejected agreement and reinstated allegations against defendant if it disagreed with the agreed-upon placement]; *In re Blessing* (1982) 129 Cal.App.3d 1026, 1030–1031 [because portion of agreed-upon sentence was unlawfully computed under subsequent Supreme Court decision, prosecution could withdraw plea agreement].)

We therefore conclude that if the trial court grants defendant's petition, the district attorney may not withdraw the plea agreement and reinstate the dismissed charges.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.